In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 310

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

On January 9, 1967, the Court of Appeals for the Second Circuit decided the case of *Federal Trade Commission* v. *Standard Motor Products, Inc.* In that case, as in the instant litigation, the court of appeals had occasion to consider the status of a cease-and-desist order issued by the Federal Trade Commission under the Clayton Act prior to its amendment by the Finality Act of 1959. The Second Circuit's opinion in *Standard Motor* states that "we do not agree with the decision in *Jantzen*. We believe that the old procedure remains available for enforcement of all orders issued before the passage of the Clayton Final-

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ity Act." The Second Circuit's views are elaborated in Part I of its opinion, reprinted for the convenience of this Court in the Appendix which immediately follows.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

APPENDIX

United States Court of Appeals for the Second Circuit

SEPTEMBER TERM, 1966

No. 34

(Argued October 24, 1966 Decided January 9, 1967)

Docket No. 30325

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD MOTOR PRODUCTS, INC., RESPONDENT

Before: LUMBARD, *Chief Judge;* MOORE and KAUFMAN, *Circuit Judges.*

* * * * *

LUMBARD, *Chief Judge:*

The Federal Trade Commission petitions for enforcement of its order issued on December 27, 1957, directing the respondent, Standard Motor Products, Inc. (Standard), to cease and desist from charging different net prices to purchasers who compete in the resale of its products, in violation of the Robinson-Patman Act, 49 Stat. 1526 (1936), 11 U.S.C. § 13.

The Commission's petition raises two important questions: (1) whether this Court has jurisdiction to

enforce cease and desist orders issued by the Commission under the Clayton Act prior to the passage of the Clayton Finality Act, 73 Stat. 243 (1959); and (2) whether the Commission correctly rejected Standard's attempted cost justification of its volume rebate system. We hold that we have jurisdiction to enforce pre-1959 orders, but we hold that in dealing with the important issue of the use of average costs of volume classes of purchasers the Commission failed to articulate criteria reconciling the objectives of the cost justification proviso with those of the Robinson-Patman Act as a whole. We therefore deny enforcement of the order.

The Commission's order, 54 F.T.C. 814 (1957), based upon findings that respondent's volume rebates injured competition among purchasers and were not justified as "made in good faith to meet an equally low price of a competitor," 49 Stat. 1526 (1936), 11 U.S.C. § 13(b), was affirmed by this Court, 265 F. 2d 674 (2 Cir. 1959), and the Supreme Court denied certiorari. 361 U.S. 826 (1959).

The Clayton Act as it stood when the Commission's order was affirmed by this Court in 1959 provided no direct sanction for violation of an order so affirmed. The Commission was required to petition the court of appeals for a decree enforcing the order, which would issue if the Court found that the order had been or was about to be violated. *Ruberoid Co.* v. *FTC*, 191 F. 2d 294 (2 Cir. 1951) (*per curiam*), aff'd, 343 U.S. 470, 477–80 (1952). The respondent might then be held in contempt if the enforcement decree was violated. E.g., *In re Whitney & Co.*, 273 F. 2d 211 (9 Cir. 1959). This Court has held that if the Commission before petitioning for enforcement of its order conducted a hearing and found

that the order had been violated, the Court could treat its findings as though it had been appointed as a master to determine whether violations had occurred. *FTC* v. *Standard Brands, Inc.*, 189 F. 2d 510 (2 Cir. 1951); cf. *FTC* v. *Washington Fish & Oyster Co., Inc.*, 271 F. 2d 39 (9 Cir. 1959).

The Commission accordingly directed Standard to file a report of its compliance with the order which this Court had affirmed. In October 1961 Standard introduced new rebate schedules, which for the first time it sought to justify as making "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which [its] commodities are * * * sold or delivered." 49 Stat. 1526 (1936), 11 U.S.C. § 13(a). Although Standard had been informed in June 1961 that the Commission's Division of Accounting had accepted Standard's 1958 cost study on which its new rebate schedules were based, the Commission in March 1962 rejected its compliance report. The Commission directed a compliance hearing, at which Standard presented a 1962 cost study. On the record of the hearing, which was certified to it without any recommendations, the Commission held that Standard had failed to show that its rebates were cost justified, and that it had therefore violated the 1957 order.

I

Standard contends that this Court lacks jurisdiction to enforce the Commission's order because of the passage of the Clayton Finality Act, 73 Stat. 243 (1959), which amended section 11 of the Clayton Act, 15 U.S.C. § 21. We do not agree. The Clayton Finality Act amended the third and fourth paragraphs of section 11, providing for review and enforcement

of Commission orders, "to read as follows," and set forth an expedited procedure under which an order becomes "final" upon affirmance by a court of appeals (subject to Supreme Court review), or, where no review has been sought, automatically upon expiration of the sixty days allowed to seek review by a court of appeals. A showing that the respondent has violated the order is not necessary. Violation of a final order draws a civil penalty of not more than $5,000 for each violation, or for each day of a continuing violation.

Section 2 of the Clayton Finality Act expressly preserved the old procedure as to certain pending "proceedings":

> The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the [Clayton Act]. Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act.

The original third paragraph of section 11 provided for enforcement of Commission orders by a court of appeals, and the fourth for review of orders at the instance of the respondent. 64 Stat. 1127 (1950), as amended.

Immediately after the passage of the Clayton Finality Act, the Commission contended that orders it had previously issued would become final within sixty days, as though they had been issued on the day the Act was passed. The District of Columbia Circuit held, however, that the new procedure applied only to orders issued after the passage of the Act.

Sperry Rand Corp. v. *FTC*, 288 F. 2d 403 (D.C. Cir. 1961). It noted that the Wheeler-Lea Act, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45, which gave orders under the Federal Trade Commission Act the expedited finality which the Clayton Finality Act extended to the Commission's orders under the Clayton Act, had explicitly provided that outstanding orders should become final under the new procedure. The Supreme Court approved the *Sperry Rand* holding in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 365 n. 5 (1962), and in response to Broch's challenge to the breadth of the order affirmed under the old procedure observed that it could be restricted if and when the Commission petitioned for enforcement.

Despite the *Broch* decision, the Ninth Circuit recently held in *FTC* v. *Jantzen, Inc.*, 356 F. 2d 253 (9 Cir. 1966), cert. granted, 35 U.S. L. Week 3111 (October 10, 1966), that the Clayton Finality Act worked an express repeal of the jurisdiction of the courts of appeals to affirm or enforce orders outstanding when the Clayton Finality Act was passed, except as to pending "proceedings" preserved by section 2. It distinguished *Broch* on the ground that the respondent in that case had petitioned a court of appeals for review under the old fourth paragraph of section 11 before the passage of the Clayton Finality Act, so that a petition for enforcement would be part of a "proceeding" saved by section 2. See 356 F. 2d at 259. The Ninth Circuit's conclusion that enforcement of the order affirmed in *Broch* would be authorized by section 2 is clearly correct, since otherwise Broch's petition for review, expressly saved by section 2, would have had to be dismissed as moot. Cf., e.g., *Muskrat* v. *United States*, 219 U.S. 346, 360–63

(1911).[1] This conclusion is fatal to Standard's contention that this Court lacks jurisdiction to enforce the Commission's order against it, since Standard, like Broch, petitioned for review under the old fourth paragraph of section 11 before the Clayton Finality Act was passed.

We do not rest our holding that we have jurisdiction upon the Ninth Circuit's narrow reading of *Broch*, however, because we do not agree with the decision in *Jantzen*. We believe that the old procedure remains available for enforcement of all orders issued before the passage of the Clayton Finality Act. There is no indication in the legislative history of the Act that Congress intended to relegate any class of outstanding orders to the limbo of unenforceability. Under the *Jantzen* ruling, the stated purpose of the Act, expedition of judicial review and enforcement of Commission orders under the Clayton Act, would be frustrated as to some 400 outstanding orders.

The Ninth Circuit suggested in *Jantzen* that Congress might well have chosen to abate pre-1959 orders because "all that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order," which will become final and enforceable after a single opportunity for review by a court of appeals. 356 F. 2d at 260. But as

[1] Thus the Supreme Court's recognition of the possibility of enforcement in *Broch* was not dictum, because a federal court must dismiss a moot case even if neither party urges it. E.g., *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 475-76 (1916); *California* v. *San Pablo & T. R.R.*, 149 U.S. 308 (1893).

commentators on *Jantzen* have observed,[2] this conclusion disregards two important factors. First, when the Commission petitions for enforcement under the old procedure, a respondent cannot raise defenses available to him when the order was originally issued, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 476–77 (1952), and may not be able to deny that his price differentials injure competition. See Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865, 897–98 (1963). It is not clear whether he would be similarly barred if a new cease-and-desist order were sought, based upon alleged new violations. Compare, e.g., *Commissioner* v. *Sunnen*, 333 U.S. 591, 599–603 (1948); *FTC* v. *Raladam Co.*, 316 U.S. 149 (1942). See generally 2 Davis, Administrative Law Treatise §§ 18.02–.04 (1958). Second, after the Commission has found that a respondent has violated the Clayton Act, it may sometimes order him to refrain from acts which in themselves would not violate the Act. E.g., *FTC* v. *National Lead Co.*, 352 U.S. 419, 430 (1957). Thus the Commission would lose important advantages if it had to seek a new order instead of obtaining enforcement of an existing order.

The Ninth Circuit relied in its decision upon the omission of the old procedure when section 11 of the Clayton Act was amended "to read as follows," and its express retention for certain limited purposes by section 2 of the Clayton Finality Act. But the rule that amendment "to read as follows" repeals everything omitted, and the maxim *expressio unius est exclusio alterius*, are aids in the interpretation of statutes, not syllogisms. They must yield where their

[2] Kauper, FTC v. Jantzen: Blessing, Disaster, or Tempest in a Teapot?, 64 Mich. L. Rev. 1523, 1540–47 (1966); Recent Decision, 34 Geo. Wash. L. Rev. 939 (1966).

application would be inconsistent with the purposes of the statute. E.g., *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350–52 (1943); 1 Sutherland, Statutes and Statutory Construction § 2017 (3d ed. Horack 1943); 2 *id* § 4917. As we have stated, we believe that the *Jantzen* decision is inconsistent with the purpose of the Clayton Finality Act.[*] For these reasons we conclude that the Commission could petition for enforcement of its 1957 order.

We turn now to whether the order should be enforced in light of the new volume rebates which Standard made effective in 1961 and 1964.

* * * * *

[Parts II and III of the opinion are irrelevant for present purposes and have not been reproduced.]

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[*] Because we hold that the purpose of the Clayton Finality Act requires that the old procedure remain applicable to orders issued before it was passed, we need not consider whether an unenforced order is a "liability" which will be preserved by the General Savings Statute, 61 Stat. 635 (1947), 1 U.S.C. § 109, unless expressly abated by Congress. Compare *FTC* v. *Jantzen, Inc.*, 356 F. 2d 253, 260–61 (9 Cir.), cert. granted, 35 U.S. L. Week 3111 (Oct. 10, 1966), with e.g., *NLRB* v. *National Garment Co.*, 166 F. 2d 233 (8 Cir.), cert. denied, 344 U.S. 845 (1948).